

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Mail Classification Schedule Change
(Lightweight Commercial Parcels)

Docket No. MC2011-28

PUBLIC REPRESENTATIVE COMMENTS CONCERNING
LIGHTWEIGHT COMMERCIAL PARCELS CLASSIFICATION CHANGE

(August 22, 2011)

I. INTRODUCTION

On August 12, 2011, the Postal Service filed a notice of classification change pursuant to 39 C.F.R. 3020.90 and 3020.91 concerning the Lightweight Commercial Parcels competitive product.¹ The Postal Service proposes to change the name of the product from “Lightweight Commercial Parcels” to “Commercial First-Class Package Service.” The Postal Service also proposes to remove the letter prohibition from the Commercial Plus price category of this product.

On August 18, 2011, a *Federal Register* notice was published on behalf of the Postal Service to add the same product to the Domestic Mail Manual, but with a different name, “First-Class Package Service.”²

The Public Representative respectfully submits the following comments in response to the Commission’s request for comments concerning Lightweight Commercial Parcels.³

¹ Notice of Minor Classification Change, August 12, 2011 (Notice).

² 76 FR 51258 (August 18, 2011) (cited as FR in this document).

³ Notice and Order Concerning Classification Changes, August 16, 2011 (Order No. 807).

II. PUBLIC REPRESENTATIVE'S COMMENTS

A. Notice Filed Pursuant to Statutory Provisions which do not Provide for Adequate Review.

The original intent of 39 C.F.R. 3020.90 *et seq.* was for the correction of scriveners' errors, or at most for correction of newly discovered inaccuracies that have long gone unnoticed with the product descriptions in the Mail Classification Schedule. Rule 3020.91 describes this as corrections to product descriptions in the Mail Classification Schedule that do not constitute a proposal to modify the product lists. There was never any intent to allow substantive changes to products under these rules. Because substantive changes were not intended, Commission review is minimal.

The rules encompassed in 39 C.F.R. 3020.30 *et seq.* were intended to be used in circumstances where the Postal Service requests a change to a product that is substantive to the extent that it might involve a change to a product list. It also could include instances where the Commission might have to reconsider whether a product continues to appear on the appropriate product list after a substantive change is made. Because consideration of substantive changes are involved, 39 C.F.R. 3020.30 *et seq.* provides for a more thorough Commission review of Postal Service proposals.

There is a void in the Commission's rules for addressing Postal Service classification change proposals that fall between a scrivener's error and a required change to a product list.⁴ The Postal Service's instant notice of classification change arguably falls within this void. The Postal Service naturally has opted to file under the more relaxed requirements of 39 C.F.R. 3020.90 *et seq.* intended for non-substantive changes. However, the Public Representative contends that the Postal Service's Notice proposes substantive product changes that require a thorough review by the Commission. The issues that the Public Representative details below explain why a

⁴ The Public Representative asks the Commission to undertake a notice and rulemaking to fill in this procedural gap.

thorough review is necessary. The Public Representative is not asking the Postal Service to re-file its Notice. However, the Public Representative does ask the Commission to follow the more rigorous procedures provided in 39 C.F.R. 3020.30 *et seq.*

The procedures of 39 C.F.R. 3020.30 *et seq.* would provide two important safeguards in this instance. First, the Postal Service's notice lacks sufficient supporting justification. Rule 3020.32 would have the Postal Service provide this information with its initial filing. As evidenced by the Postal Service's *Federal Register* filing, this information is available.⁵ Instead, the Postal Service's lack of supporting information gave the Commission no choice but to take time out of the schedule to request additional information (Order 807). This severely limited commenters' ability to provide meaningful comments. Commenters now will have one business day to incorporate any new information provided by the Postal Service.

There is a second benefit to 39 C.F.R. 3020.30 *et seq.* review. Because review under this section might involve a product list change, the Postal Service may not make the classification change until the Commission's review is complete. See 39 USC 3642(e). In this instance, the Postal Service has already completed a substantive classification change, and published it in the *Federal Register* as a final rule, without benefit of Commission review.

B. Proposed Name Change

The Public Representative opposes changing the name of the product from "Lightweight Commercial Parcels" to "Commercial First-Class Package Service." The similarity of the proposed name with the names of other Postal Service offerings will lead to customer confusion, and is deceptive.

⁵ The Public Representative suggests that the Commission may opt to change its rules to require the Postal Service to file advance copies of *Federal Register* notices, when available.

The Postal Service is well aware of the confusion similar product names might cause. In its response to a Commission question, the Postal Service expresses concern that the original “Lightweight Commercial Parcels” might be confused with the “Lightweight Parcel Select” product and the service that product receives.⁶

The Postal Service states it selected the “Commercial First-Class Package Service” name to reflect that the product will continue to receive First-Class Mail service treatment including continued use of the same transportation network. *Id.* The Postal Service asserts that “consumers” will not be confused because Commercial First-Class Package Service is only available to “commercial mailers.” Response to Question 3(b).

If the inference that the Postal Service makes is that commercial mailers are sophisticated enough to understand what level of service they will obtain with Commercial First-Class Package Service, the Public Representative contends they also are sophisticated enough to understand what level of service they will obtain with a product name that does not include the confusing First-Class terminology.

The Postal Service has trademarked the name of its flagship class “First-Class Mail.” With limited exceptions, any matter eligible for mailing may be mailed as First-Class Mail. Customers recognize First-Class Mail as receiving first-rate service, as well as being sealed against postal inspection. First-Class Mail also is included within the market dominant product category, and receives a higher level of regulatory oversight.

Customers might infer that the term “First-Class” in the proposed “Commercial First-Class Package Service” name means that Commercial First-Class Package Service will receive “First-Class Mail” treatment. The Postal Service already states this as fact in its *Federal Register* notice. FR at 51258. This is misleading, if not deceptive.

Commercial First-Class Package Service is a competitive product, not a market dominant product. Not one of the market dominant statutory safeguards will apply to the new product. Some price categories of Commercial First-Class Package Service

⁶ Response of the United States Postal Service to Notice and Order Concerning Classification Changes, August 19, 2011 (Postal Service Response), Postal Service Response to Question 2.

will not be sealed against postal inspection. All First-Class Mail is sealed against inspection. Some price categories of Commercial First-Class Package Service have content restrictions related to the Private Express Statute limitations. With limited exceptions, any mailable item may be mailed as First-Class Mail. There is no statutory requirement to monitor and report (to the Commission and to the public) actual service performance as with First-Class Mail. Furthermore, safeguards are not in place to prevent changes to service performance without regulatory oversight. Hence, Commercial First-Class Package Service does not receive First-Class Mail treatment.

The Postal Service also has a market dominant class named "Package Services." Customers might associate the term "Package Service" in the proposed "Commercial First-Class Package Service" name with the "Package Services" class. This will lead to further customer confusion. Again, Commercial First-Class Package Service does not offer the same service as Package Services.

Trademarked terms also have significant business value. The Postal Service should be cognizant of its trademarks, especially First-Class Mail, and not take any steps which might devalue these important assets. Marketing ploys which create an illusion in customers' minds that they are receiving a superior service, when in fact they might not, will only harm the First-Class Mail trademark.

The Postal Service creates additional customer confusion by referring to its product as "Commercial First-Class Package Service" in the Mail Classification Schedule, and "First-Class Package Service" in the Domestic Mail Manual. The Public Representative contends that the same product name should be used in the Mail Classification Schedule, the Domestic Mail Manual, and when dealing with users of the mail. The Public Representative urges the Commission not to approve the produce name change at least until the Postal Service can coordinate among its various departments and internally agree upon a consistent name.

C. Proposed Removal of Letter Restriction

The Public Representative does not oppose removing the letter prohibition from the Commercial Plus price category of this product. Current prices are greater than six times the current price to mail the first ounce of a First-Class Mail letter. See 39 U.S.C. 601(b)(1).

D. Sealed Against Inspection

The Postal Service makes a third classification change to seal the Commercial Plus price category of mail against postal inspection. This is not discussed in the narrative of the Notice, nor is the change reflected in the originally proposed Mail Classification Schedule language. Not until the Postal Service Response to Question 5 does the Postal Service propose Mail Classification Schedule language reflecting this change.⁷ All price categories of the original Lightweight Commercial Parcels product were not sealed against postal inspection (both Commercial Base and Commercial Plus).

Because of the product differences created by sealing Commercial Plus against postal inspection versus not sealed Commercial Base against postal inspection, the Public Representative questions whether both price categories should be considered as one product, or should be reclassified into two distinct separate products. Providing one product with price categories having different characteristics might or might not be appropriate, and might be confusing to customers.

With Commercial Plus sealed against postal inspection and Commercial Base not, the price categories of the overall product also might exhibit sufficiently different cost and market characteristics that they should be considered separate products.

⁷ The *Federal Register* notice indicates that Commercial Plus price category of Commercial First-Class Package Service will be changed to be sealed against inspection. FR at 51259.

Again, the need to answer this question would justify providing a more comprehensive review pursuant to 39 C.F.R. 3020.30 *et seq.*

Creating another product sealed against postal inspection has far ranging legal ramifications, which have not been discussed or presented to the Commission for consideration. The Public Representative urges the Commission to deny this change until such time as the Postal Service can provide any justification or analysis supporting this classification change.

E. Effective Date

The Postal Service establishes an effective classification change date of August 29, 2011 based on allowing time to make internal systems changes and changes to the Domestic Mail Manual. Postal Service Response, Question 1. The Postal Service's *Federal Register* notice has already published its Domestic Mail Manual changes and announced an October 1, 2011 date to begin the program. FR at 51258.

While the Public Representative does not oppose establishing a Mail Classification Schedule effective date earlier than the actual product availability date, the Public Representative is concerned that some mailers might become confused and believe that the product will be available on the earlier August 29, 2011 date. The Public Representative suggests that the Postal Service internally coordinate among its departments and publish only one program start date to avoid potential confusion.

III. CONCLUSION

The Public Representative respectfully submits the foregoing comments for the Commission's consideration.

Respectfully submitted,

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